Filed 9/30/03 P. v. Gonzalez CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RAUL GONZALEZ, et al., Defendants and Appellants.	B160207 (Los Angeles County Super. Ct. No. BA 229464)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Kennedy Powell, Judge. Affirmed.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant Raul Gonzalez.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant Eduardo Hernandez.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Stephen A. McEwen, Deputy Attorney General, Laura J. Hartquist, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendants and appellants Raul Gonzalez (Gonzalez) and Eduardo Hernandez (Hernandez) each of one count of attempted second-degree robbery and three counts of second-degree robbery. During jury deliberations, the jury requested read back of the prosecutor's closing argument and also submitted questions concerning, among other things, aiding and abetting. The trial court permitted the prosecutor's closing argument to be read back to the jury and gave an additional instruction, CALJIC No. 3.02 regarding the natural and probable consequences doctrine, to the jury. The trial court also reopened closing argument on the issue of aiding and abetting. Defendants contend on appeal that allowing read back of the prosecutor's closing argument, instructing the jury with CALJIC No. 3.02, and reopening closing argument constituted reversible error. We hold that no error occurred, and we therefore affirm the judgments.

BACKGROUND

The robbery

Late one evening in March 2002, Odilon Estrada, Luis Aguilar Melgarejo, Rodrigo Estrada Melgarejo, and Juan Manuel Estrada Hernandez were at a pay phone calling a taxi.[1] Defendants Gonzalez and Hernandez approached them, and one or both of them said, "The money" or "The money, bastards." Odilon said that Gonzalez rifled through his pockets and took out some pictures, which Gonzalez threw on the ground. Gonzalez did not take anything from Odilon, but Odilon saw that Gonzalez had a gun. Hernandez did not touch, threaten, or say anything to Odilon.

Luis said that Gonzalez took $200 from him, and although he could tell that Gonzalez had something in his hand, he could not tell what it was. Hernandez did not take anything from him or say anything to him, although he did touch Luis's pockets.

---

[1] Because some of the victims share surnames, we refer to the victims using their first names.

Juan testified that both Hernandez and Gonzalez told him and the other victims to give them their money. Gonzalez took his money, and Gonzalez had a gun that he put by Juan's waist. Hernandez did not take anything from him, but he saw Hernandez stick his hand in Rodrigo's pocket, and he thought Hernandez might have also stuck his hand in Luis's pocket.

Rodrigo testified that Hernandez took $269 from him.

While the robbery was taking place, Officers Michael Martinez and Rudolfo Chong were passing by in a police car. Officer Martinez said he saw Hernandez, rather than Gonzalez, going through Odilon's pockets. Gonzalez was pointing a gun at one of the men. Hernandez and Gonzalez attempted to flee, but they were both apprehended. When Hernandez was being taken into custody, he said, " I took the money from the two paisas [countrymen]." Hernandez had $480 on him.

Gonzalez and Hernandez were each charged with one count of attempted second-degree robbery (Pen. Code, §§ 211, 664)[2] and three counts of second-degree robbery. The information alleged that Gonzalez personally used a firearm. (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)(1), 12022.53, subd. (b).) As to all counts and both defendants, the information alleged that in the commission and attempted commission of the crimes a principal was armed with a firearm (§ 12022, subd. (a)(1)). The information also alleged that Gonzalez had suffered three prior convictions, which he admitted.

Jury instructions and jury deliberations

The trial court instructed the jury with, among other things, CALJIC No. 3.01.[3] Thereafter, on June 24, 2002, the jury commenced deliberations at 3:38 p.m. and were

---

[2] Unless otherwise indicated, all further statutory references are to the Penal Code.

[3] CALJIC No. 3.01 provides as follows: "A person aids and abets the commission of a crime when he, 1. With knowledge of the unlawful purpose of the perpetrator, and 2. With the intent or purpose of committing or encouraging or

excused for the day at 4:00 p.m. Deliberations recommenced the next day at 8:53 a.m. The jurors requested that Rodrigo's and Officers Martinez's and Chong's testimony be read back in the morning. They also requested "to have the boards with [the prosecutor's] summary of facts for her closing argument, if not, may we have it read back to us."

Hernandez's counsel objected to the prosecutor's closing argument being read back to the jury on the grounds that argument is not evidence, that reading just the prosecutor's argument would upset the flow of closing arguments and highlight something that is not evidence, and that it would give an unfair advantage to the prosecution. The trial court overruled the objections and stated, "Well, I feel that the jury knows what it wants. And there is no prohibition to having argument read back. [¶] They probably remember your persuasive argument without having it read back. But [the prosecutor's] perhaps wasn't as clear as yours, and they needed to hear it again. [¶] I don't know. But it is up to them what they feel could assist them. [¶] They certainly can consider the arguments in reaching a decision, so I don't see that there is any prohibition to having an argument read back to answer what their specific request is which, I guess they are still trying to figure out." Before permitting the "readback" of the prosecutor's closing argument, the trial court admonished the jury that it had to consider everything that had been presented. Testimony and argument were read back to the jury, and they were excused at 4:15 p.m.

The readback of the testimony continued the next day, June 26, 2002. At its conclusion at 9:52 a.m., the trial court reminded jurors that argument is not evidence. The jury resumed deliberations and was excused for the day at 4:00 p.m.

---

facilitating the commission of the crime, and 3. By act or advice aids, promotes, encourages or instigates the commission of the crime. Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting."

On June 27, 2002, the jurors resumed deliberations and, in the afternoon, sent out the following note: "We've reached a full verdict on 3 of the counts and reached a verdict as to guilt on the other but cannot reach a verdict on any others. What happens now?" The trial court asked the jury if there was anything that might be of assistance in helping it reach a verdict. Several jurors asked questions, and the trial court asked the jury to put its questions in writing.

The jury sent out the following questions: "(1) Since the crime has been split into 8 different counts, are we legally allowed to see it as 1 crime not as 4 separate crimes? (2) Can you clarify item #3 of definition of aiding and abetting on page 9 of the instructions? (3) Can we find a defendant guilty of robbery but hang on a special allegation?" As to the first question, Hernandez's counsel requested that the trial court refer the jury to CALJIC Nos. 17.00 and 17.02 (which had previously been given),[4] and objected to instructing the jury with CALJIC No. 3.02 ["Principals—Liability For Natural And Probable Consequences"], as the trial court suggested, because it would lead the jury to conclude that Hernandez was a principal in the crime and because it was inapplicable. Gonzalez's counsel said he thought that the trial court should just respond "No" and maybe read CALJIC Nos. 17.00 and 17.02. The trial court overruled the objections. Hernandez's counsel asked for five minutes of additional argument by each attorney, but the trial court declined the request "at this point." The trial court instructed the jury with CALJIC No. 3.02, but also told the jury that the trial court was not "expressing any opinion as to what you should decide the facts to be in this case" and that

---

[4] The jury was instructed with CALJIC No. 17.00 as follows: "You must decide separately whether each of the defendants is guilty or not guilty. If you cannot agree upon a verdict as to both the defendants, but do agree upon a verdict as to any one of them, you must render a verdict as to the one as to whom you agree."

The jury was also instructed with CALJIC No. 17.02 as follows: "Each Count charges a distinct crime. You must decide each Count separately. The defendant may be found guilty or not guilty of any or all of the crimes charged in Counts One through Four. Your finding as to each Count must be stated in a separate verdict."

the instruction was "no more or less important than the other instructions but should be considered in conjunction with all the other instructions."[5] The trial court also referred the jury to CALJIC Nos. 17.00 and 17.02.

As to the second question, the trial court said it would tell them they would have to try to work out their understanding of "by act or advice, aids, promotes, encourages or instigates the commission of the crime." The trial court told the jury that it would allow additional argument if it still had a question after further deliberations. As to the third question, the trial court responded, Yes."

At 3:10 p.m., the jurors resumed deliberations, and informed the trial court at 3:40 p.m. that it had reached a verdict. The jury, however, had not reached a verdict on all counts. The trial court said, "It appears that you have reached verdicts on count 1, 2, and

---

[5] In instructing the jury with CALJIC No. 3.02, the trial court said: "One who aids and abets another in the commission of a crime or crimes is not only guilty of that crime but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crimes originally aided and abetted. [¶] In order to find the defendant guilty of the crimes of robbery and/or attempted robbery, you must be satisfied, beyond a reasonable doubt, that: 1. The crime or crimes of robbery and/or attempted robbery were committed; 2. That the defendant aided and abetted those crimes; 3. That a co-principal in that crime committed the crimes which consists of additional counts of robbery; and 4. The additional crimes of robbery were a natural and probable consequences of the commission of the original crime of either attempted robbery or robbery. [¶] You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted, so long as you are satisfied, beyond a reasonable doubt, and unanimously agree that the defendant aided and abetted the commission of an identified and defined target crime and that the subsequent crimes were a natural and probable consequence of the commission of that target crime. Whether a consequence is natural and probable is an objective test based not on what the defendant actually intended but on what a person of reasonable and ordinary prudence would have expected would be likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A natural consequence is one which is within the normal range of outcomes that may be reasonably expected to occur, if nothing unusual has intervened. Probable means likely to happen."

4 as to one of the defendants, and on count 3 as to one defendant."[6] The jury was deadlocked on the remaining counts, and the trial court asked each juror if he or she believed there was anything the trial court could do to assist it in reaching a decision. Six jurors responded, "Yes," and therefore the trial court allowed counsel five minutes to reargue the aiding and abetting issue as presented by the jury's questions.[7] The jury resumed deliberations at 4:10 p.m., and, at 4:47 p.m., informed the trial court that it had reached a verdict.

The jury found Gonzalez and Hernandez guilty of attempted second-degree robbery of Odilon and of second-degree robbery of Rodrigo, Juan, and Luis. As to Gonzalez, the jury found true the allegation that a principal was armed with a firearm in the commission and attempted commission of the crimes. The jury found not true the allegation that Gonzalez personally used a firearm as to Odilon and Rodrigo, but true as to Juan and Luis. As to Hernandez, the jury also found true the allegation that a principal was armed with a firearm in the commission and attempted commission of the crimes.

The trial court sentenced Gonzalez to a term of 24 years and 8 months, and Hernandez to a term of 7 years and 8 months.

DISCUSSION

I. Coercion of the jury's verdict

Hernandez contends that the trial court coerced a verdict, thereby violating his due process rights, by allowing the prosecutor's closing argument to be read back to the jury, instructing the jurors with CALJIC No. 3.02, and ordering further closing argument after

---

[6] Thereafter, Hernandez's counsel asked the trial court what had been the jury's partial verdict, and the trial court said that "there were two on Gonzalez and one on Hernandez." In fact, the jury said it had reached a verdict on three of the counts as to one defendant and on one count as to the other defendant.

[7] Gonzalez's counsel waived additional argument.

CALJIC No. 3.02 had been given and after the jury indicated it was still deadlocked. Gonzalez similarly contends that the trial court coerced a verdict by allowing read back of the prosecutor's closing argument and instructing the jury with CALJIC No. 3.02. We do not agree with these contentions.

A jury cannot be discharged after a cause has been submitted until they have agreed on their verdict or unless it appears that there is no reasonable probability the jury can agree. (§ 1140.)[8] "The court has a primary duty to help the jury understand the legal principles it is asked to apply. . . . [A] court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97; see also *People v. Thompkins* (1987) 195 Cal.App.3d 244, 250 ["A jury's request for reinstruction or clarification should alert the trial judge that the jury has focused on what it believes are the critical issues in the case. The judge must give these inquiries serious consideration"]; see also § 1138.)[9]

"The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency. (*People v. Carter* (1968) 68 Cal.2d 810, 817.)'" (*People v.*

---

[8] Section 1140 provides in full: "Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

[9] Section 1138 provides: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

Breaux (1991) 1 Cal.4th 281, 319; see also *People v. Sandoval* (1992) 4 Cal.4th 155, 195-196.) Any claim that the jury was coerced into reaching a verdict depends on the particular circumstances of the case. (*People v. Breaux, supra,* 1 Cal.4th at pp. 319-320; *People v. Rodriguez* (1986) 42 Cal.3d 730, 775-776; *Jenkins v. United States* (1965) 380 U.S. 445, 446 [claim of coercion under federal law must be evaluated in context and under all the circumstances].) For example, coercion has been found when the trial court, by insisting on further deliberations, expressed an opinion that a verdict should be reached or has threatened to lock up the jury or to prolong its deliberations indefinitely. (See, e.g., *People v. Carter, supra*, 68 Cal.2d at pp. 817-818, abrogated on other grounds by *People v. Gaines* (1977) 19 Cal.3d 835, 851-852; *People v. Crossland* (1960) 182 Cal.App.2d 117, 119; *People v. Crowley* (1950) 101 Cal.App.2d 71, 75.)

In this case, none of the three actions the trial court took during jury deliberations of which defendants complain coerced a verdict.

A. *Read back of the prosecutor's closing argument*[10]

Whether a jury should rehear argument of counsel is within the trial court's discretion. (*People v. Sims* (1993) 5 Cal.4th 405, 452; *People v. Gordon* (1990) 50 Cal.3d 1223, 1260, overruled on another ground in *People v. Edwards* (1991) 54 Cal.3d 787, 835; *People v. Gurule* (2002) 28 Cal.4th 557, 649 [trial court has discretion not to allow read back of defense counsel's argument].) Here, the jury specifically requested the prosecutor's argument be read back to it. The trial court repeatedly reminded the jury, both before and after the argument was read back to it, that argument is not evidence. The trial court also reminded the jury that it had to consider everything that had been presented, including the arguments of defense counsel. Under these

---

10 We need not consider whether Gonzalez waived any error by not objecting to the readback of the prosecutor's closing argument because, as we discuss, Hernandez's counsel did object, and no error occurred.

circumstances, we hold that the trial court did not abuse its discretion in allowing the prosecutor's argument to be read back to the jury.

B. *CALJIC No. 3.02*

After the jury submitted questions that included a request for clarification on the aiding and abetting instruction (CALJIC No. 3.01), the trial court instructed the jury with CALJIC No. 3.02. Defendants contend doing so was coercive.

A deliberating jury may be given further instruction that is a correct statement of the law. (*People v. Stouter* (1904) 142 Cal. 146, 149 (*Stouter*); *People v. Purcell* (1937) 22 Cal.App.2d 126, 134.) But giving an additional instruction to a deliberating jury may be error in certain circumstances. For example, in *Stouter,* the trial court, after initially instructing the jury, gave an additional instruction regarding attempt. At the time the trial court gave the new attempt instruction, the jury had been deliberating for a long time, had repeatedly told the trial court it could not agree, and had essentially informed the trial court of their opinions and how a verdict might be reached if the instructions were changed. (*Stouter,* at p. 150.) Under these circumstances, the California Supreme Court held that the judgment had to be reversed. (See also *People v. Jennings* (1972) 22 Cal.App.3d 945, 948-949.)[11]

Unlike in *Stouter, supra,* 142 Cal. 146, when the giving of an additional instruction was apparently intended to help the jurors reach a verdict of guilty, there is no indication here that the giving of CALJIC No. 3.02 was intended to coerce the jury into reaching a specific verdict of guilt rather than a verdict in general. The trial court did not give the instruction in a vacuum in which aiding and abetting had never been mentioned, as the jury had already been instructed with CALJIC No. 3.01. Moreover, the jury indicated in its questions that the problem it was having in reaching a verdict centered on

---

11 The court in *Stouter* also indicated that it did not believe the evidence was sufficient to support an attempt to commit the crime charged.

aiding and abetting—a theory that had already been introduced. Thus, giving CALJIC No. 3.02 "merely amplified the original instructions as to the offense originally submitted to the jury; [it] did not, as in *Stouter* [], introduce, in the midst of jury deliberation, a new and theretofore unmentioned offense." (*People v. Jennings, supra,* 22 Cal.App.3d at p. 949.) The trial court also told the jury it had to consider all of the instructions, and not just CALJIC No. 3.02, and the trial court reread CALJIC Nos. 17.00 and 17.02, which instructed the jurors it had to decide whether each defendant is guilty or not guilty and to decide each count separately. (See fn. 4, *infra.*)

Nor was it improper or unduly suggestive to give CALJIC No. 3.02. Defendants contend the evidence showed that each defendant robbed separate victims and did not have contact with the victim or victims his codefendant robbed, and therefore they did not aid and abet each other in a target robbery. They also argue that the instruction improperly suggested that there was a principal. In fact, the evidence showed that Hernandez took money from Rodrigo. Gonzalez, who had a gun, took money from Luis and Juan, and searched Odilon's pockets. But there was also testimony that both defendants, upon approaching the victims, told the victims to give them money. Juan also thought, but was uncertain, that Hernandez might have stuck his hand in Luis's pocket. Luis said Hernandez touched his pockets.

This evidence supported giving CALJIC No. 3.02, which clarified—rather than added—the theory of aiding and abetting. The jury, having been instructed only with CALJIC No. 3.01, may have been unsure whether they could, for example, convict Hernandez based on the acts Gonzalez committed. Giving CALJIC No. 3.02 informed the jury that if a defendant aided and abetted a principal in the initial target crime of robbery or attempted robbery, the defendant was liable for any crime (i.e., a robbery or attempted robbery) that was the natural and probable consequence of the target crime.

For these reasons, we also reject Hernandez's additional contention that the verdicts on counts 1 (attempted second-degree robbery of Odilon), 2 (second-degree robbery of Juan), and 4 (second-degree robbery of Luis) must be reversed because, he

argues, CALJIC No. 3.02 did not apply to the facts of this case in that there was no evidence he and Gonzalez aided and abetted each other in any initial planned target crime. As stated above, there was evidence from the jury could conclude that the defendants aided and abetted each other.

In addition, that the trial court knew the jury had or likely had reached a guilty verdict on count 3 (second-degree robbery of Rodrigo) as to Hernandez does not support Hernandez's argument that giving CALJIC No. 3.02 coerced the jury into finding him guilty as an aider and abettor on the remaining counts. The possibility that further instruction might lead to a guilty verdict does not mean the instruction is coercive. The jury said it was having difficulty understanding aiding and abetting. CALJIC No. 3.02 clarified the issues concerning aiding and abetting, and it was supported by the evidence. Therefore, notwithstanding that the giving of the instruction might lead the jury to conclude Hernandez was guilty as an aider and abettor as to counts 1, 2, and 4, the instruction was warranted in response to the jury's questions.

C. *Further Closing Argument*

After the trial court gave CALJIC No. 3.02, the jury resumed deliberations and, that same day, informed the trial court it had reached a verdict. In fact, the jury had only reached a verdict on three counts as to one defendant and one count as to the other defendant. The trial court then asked if there was anything further it could do to assist the jury in reaching a verdict. Six jurors responded in the affirmative. Therefore, the trial court ordered further closing argument.

A trial court has the discretion to reopen closing argument. (See *People v. Bishop* (1996) 44 Cal.App.4th 220, 235.) Here, when half of the jurors stated that they believed further assistance would help, the trial court was correct in attempting to give it. The trial court had given additional instructions and the jury had evidenced confusion. Under these circumstances, the trial court did not abuse its discretion in allowing further arguments. The short time (approximately 30 minutes) between the additional closing

arguments and the jury's reaching its final verdict of guilty on all counts as to both defendants does not suggest coercion. The jury had been focusing on aiding and abetting for some time—at least since the afternoon after lunch when they sent out a note concerning aiding and abetting.

Moreover, neither counsel objected to giving further closing argument, and therefore they have waived any argument on appeal that it was error for the trial court to order it. (See *People v. Bishop, supra,* 44 Cal.App.4th at p. 235 [defendant, by failing to request additional argument to address a new theory of culpability, waived his objection to counsel's lack of opportunity to present an argument on a special circumstance instruction].) We also reject any argument on appeal that the failure to object gives rise to a claim for ineffective assistance of counsel. As stated above, ordering further closing argument was not improper. Also, Gonzalez's counsel's decision not to give further closing argument is the type of tactical decision that we will not second-guess on appeal. (*People v. Hines* (1997) 15 Cal.4th 997, 1065 [Court of Appeal will not assume constitutionally inadequate representation and reverse a conviction unless the appellate record discloses "'no conceivable [legitimate] tactical purpose'" for counsel's act or omission].)

DISPOSITION

The judgment is affirmed.

MOSK, J.

We concur:

TURNER, P.J. ARMSTRONG, J.